

New York Court Holds Lack of Cooperation Disclaimer Untimely

January 2008

The Appellate Division of the New York Supreme Court has held that an insurer is required to defend and indemnify a policyholder, despite the policyholder's well-documented and longstanding failure to cooperate, reasoning that the passage of more than two months between the insurer's awareness of the insured's refusal to cooperate and its disclaimer rendered the disclaimer for breach of the cooperation clause untimely. *Continental Casualty Co. v. Stradford*, 2007 WL 4328725 (N.Y. App. Div. Dec. 11, 2007).

The insurer provided a defense to a dentist in connection with two underlying dental malpractice actions. The dentist failed to cooperate with the insurer by: (1) ignoring written correspondence and telephone calls from the insurer's representatives and from defense counsel; (2) repeatedly refusing to provide requested documents, records, and evidence; (3) refusing to consent to a recommended settlement based on adverse findings of experts retained to review the underlying facts; (4) refusing to execute stipulations consenting to a change of attorney that the insured requested; and (5) failing to appear for scheduled depositions and meetings.

This course of conduct mirrored the dentist's lack of cooperation in two other underlying actions where the insurer had also provided a defense for the dentist. Based on the dentist's willful failure to cooperate in the other two actions, the insurer sought, and was granted, declaratory relief relieving it of any duty to defend or indemnify the dentist with respect to those actions in June 2004. Given that the dentist's failure to cooperate was almost identical in the later two actions, the insurer's claims consultant issued letters in July 2004 advising the dentist that his continued non-cooperation threatened the availability of coverage under the policy for the two subsequent malpractice actions. Both letters were returned as "unclaimed" in August 2004. After consulting coverage counsel, the insurer denied coverage for breach of the cooperation clause in October 2004. The insurer then sought, and was granted, declaratory relief relieving it of any duty to defend or indemnify the dentist with respect to the second set of underlying actions.

On appeal, the court reversed the trial court's grant of summary judgment for the insurer on the grounds that the insurer's disclaimer was untimely. As an initial matter, the court held that the insurer "carried its burden to establish that it acted diligently in seeking to bring about [the dentist's] cooperation, that its efforts were reasonably calculated to obtain [the dentist's] cooperation, and that the attitude of [the dentist], its insured,

after his cooperation was sought, was one of willful and avowed obstruction." Nonetheless, the court reasoned that these findings were insufficient to overcome its conclusion that the insurer did not make its disclaimer in timely fashion. The court held that the insurer "had sufficient information to support a disclaimer of coverage not later than . . . the date of the return of the letters marked unclaimed." Accordingly, "[t]he lapse of in excess of two months from . . . the date it was readily apparent that its efforts to obtain the cooperation of its insured were fruitless, until . . . the date [the insurer] sent its disclaimer letter" established that its denial was not "as soon as is reasonably possible" under Section 3420(d) of the New York Insurance Law.

The court also rejected the insurer's contention that the delay was due to its seeking advice from coverage counsel as "undocumented and conclusory." In rejecting the insurer's asserted need to consult with coverage counsel, the court placed special emphasis on the nearly identical conduct of the insured in all four of the underlying actions, holding that "there is no basis to now conclude that [the dentist's] conduct in the two sets of claims was so distinct as to justify the need for extensive consultation with coverage counsel over a period of two months."